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Supreme Court, U.S.  
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JOSEPH F. SPANIOLO, JR.  
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No. 88-305

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1988

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STATE OF SOUTH CAROLINA, Petitioner,  
  
v.

DEMETRIUS GATHERS, Respondent.

-----  
ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF SOUTH CAROLINA  
-----

**BRIEF OF AMICI CURIAE**

State of California, Joined by the  
States of Alabama, Connecticut, Florida,  
Georgia, Illinois, Indiana, Kentucky,  
Maryland, Missouri, New Jersey, New  
Mexico, Nevada, North Carolina, Oklahoma,  
Oregon, Virginia, Washington, and  
Wyoming, in support of the State of South  
Carolina, Petitioner.  
-----

JOHN K. VAN DE KAMP  
Attorney General of the  
State of California

STEVE WHITE  
Chief Assistant Attorney General

MICHAEL D. WELLINGTON  
Supervising Deputy Attorney General

FREDERICK R. MILLAR, JR.  
Supervising Deputy Attorney General

110 West A Street, Suite 700  
San Diego, California 92101  
(619) 237-7766

Counsel for Amicus Curiae  
State of California

QUESTIONS PRESENTED

I. Does the Eighth Amendment preclude a prosecutor's comments during a capital murder penalty phase on personal characteristics of the victim where the characteristics are based on evidence admitted in the guilt phase to show the circumstances of the crime?

II. Does Booth v. Maryland (1987) \_\_\_U.S.\_\_\_, 96 L.Ed.2d 440, preclude prosecutorial comment during a penalty phase closing argument on evidence introduced during the guilt phase of the trial that reveals personal characteristics of the victim?

III. Whether this Court's decision in Booth v. Maryland, supra, misconstrued the requirements of the Eighth Amendment and was wrongly decided?

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### INTEREST OF THE AMICI CURIAE

In California, as in other states, the circumstances of the crime are a proper subject of evidence and argument in the penalty phase (Pen. Code § 190.3(a)), as bearing on the culpability of the defendant. Indeed, the circumstances of the crime are typically the primary factors relied on by a prosecutor. The circumstances of the crime frequently disclose personal characteristics of the victim which are relevant to a fair assessment of the character and personal culpability of the defendant.

This Court's decision in Booth v. Maryland (1987) \_\_U.S.\_\_, 96 L.Ed.2d 440, has engendered considerable confusion among prosecutors concerning the permissible scope of evidence and prosecutorial argument in capital cases concerning the circumstances of the

crime, where such circumstances reveal personal characteristics of the victim.

The California Supreme Court has similarly demonstrated uncertainty in its efforts to construe the scope of Booth. For example, in People v. Siripongs (1988) 45 Cal.3d 548, 579-580, 247 Cal.Rptr. 729, 747-748, 754 P.2d 1306, 1324-1325, the court stated that "mere argument, without instructions on that subject, may not be prohibited by Booth." (45 Cal.3d, at p. 580, 247 Cal.Rptr. at p. 748, 754 P.2d at p. 1324, emphasis by the court.) But in People v. Hovey (1988) 44 Cal.3d 543, 577, 244 Cal.Rptr. 121, 140-141, 749 P.2d 776, 795, the court characterized the prosecutor's reference in penalty phase argument to the impact of the victim's death upon her parents as "arguably inappropriate" under Booth, even though the prosecutor's remarks "were confined



to matters already obvious to any juror." Similarly, in People v. Ghent (1987) 43 Cal.3d 739, 771, 239 Cal.Rptr. 82, 103, 739 P.2d 1250, 1271, the court stated that the prosecutor's "brief reference" to the impact of the victim's death upon her family was "arguably inappropriate" under Booth. So too, in People v. Adcox (Nov. 17, 1988; Crim. 23192/S004558)

\_\_\_ Cal.3d \_\_\_, \_\_\_ Cal.Rptr. \_\_\_, \_\_\_ P.2d \_\_\_), the court characterized the prosecutor's argument that in murdering the victim the defendant showed "no concern for human life or for [the victim's wife or sons] when he committed that act" as "arguably inappropriate" under Booth.

Expansive interpretations of Booth have been advocated by counsel for capital defendants. In People v. Karis (1988) 46 Cal.3d 612, 640-641, 250 Cal.Rptr. 659, 675, 758 P.2d 1189, 1205,

appellant argued that Booth precluded testimony in aggravation by a live prior victim of his assaultive conduct, on the ground it was inflammatory in the same way testimony by the victim's family is inflammatory. In rejecting this contention, the California Supreme Court stated that ". . . the impact of a capital defendant's crimes on the victims of those crimes is relevant to the penalty decision." (People v. Karis, supra, 46 Cal.3d at p. 641, 250 Cal.Rptr. at p. 675, 758 P.2d at p. 1205, fn. omitted). Yet in People v. Boyde (1988) 46 Cal.3d 212, 249 (fn. 5), 250 Cal.Rptr. 83, 104 (fn. 5), 758 P.2d 25, 46 (fn. 5), the court found "arguably improper" testimony by other actual victims of appellant, who described Boyde's conduct and "also mentioned the effect it had on them." In People v. Keenan (1988) 46 Cal.3d 478, 510 (fn. 14), 250 Cal.Rptr.

550, 570 (fn. 14), 758 P.2d 1081, 1101 (fn. 14), appellant contended that Booth precludes "unrebuttable, nonrecord inferences that he lacked remorse." More recently, in People v. Malone (Nov. 3, 1988; Crim. 23155/S004553) \_\_\_ Cal.3d \_\_\_, \_\_\_ Cal.Rptr \_\_\_, \_\_\_ P.2d \_\_\_, the court concluded that "any error" in the prosecutor's "brief and mild" request that the jury consider the feelings of the victim of a prior murder, proved as an "other crime" in aggravation under California law [Cal. Pen. Code, § 190.3, factor (b)] was harmless beyond a reasonable doubt.

Published decisions from other jurisdictions similarly reflect difficulties in understanding the scope and interpretation of Booth. See e.g. State v. Cummings (N.C. 1988) 372 S.E.2d 541, 550-551; State v. Brown (N.C. 1987) 358 S.E.2d 1, 17-18, cert. den. sub nom.

Brown v. North Carolina, \_\_\_U.S.\_\_\_, 98 L.Ed.2d 406; Hunt v. State (Md. 1988) 540 A.2d 1125, 1127-1128; State v. Colvin (Md. 1988) 548 A.2d 506, 516; Daniels v. State (Ind. 1988) 528 N.E.2d 775, 782; People v. Spreitzer (Ill. 1988) 525 N.E.2d 30, 44-45, cert. den. sub nom. Spreitzer v. Illinois, \_\_\_U.S.\_\_\_, 57 U.S.L.Wk. 3281; People v. Jones (Ill. 1988) 528 N.E.2d 648, 665-666; People v. Britz (Ill. 1988) 528 N.E.2d 703, 714-716; Preston v. Dugger (Fla. 1988) 531 So.2d 154, 160, stay gr. sub nom. Preston v. Florida, \_\_\_U.S.\_\_\_, 101 L.Ed.2d 978; Gilmore v. Armontrout (8th Cir. 1988) 8th Cir. No. 88-1378, filed Nov. 10, 1988, \_\_\_F.2d \_\_\_, reversing 681 F.Supp. 632 (W.D.Mo. 1988).

In addition, other states have similar Booth issues which have yet to be resolved.

We believe that Booth should either be limited and clarified, or overruled as an incorrect construction of Eighth Amendment requirements.

SUMMARY OF ARGUMENT

Circumstances of the offense which are in evidence, and which reveal personal characteristics of the victim, should properly be subject to reasonable comment by the prosecutor in penalty phase argument. Such personal characteristics may be relevant to the sentencer's assessment of the gravity of the offense and the culpability of the defendant, by giving the jury ". . . a quick glimpse of the life [the defendant] chose to extinguish." (Mills v. Maryland (1988) \_\_\_U.S.\_\_\_, 100 L.Ed.2d 384, 408, Rehnquist, C.J., dissenting, joined by O'Connor, Scalia and Kennedy, JJ.) Such evidence, unlike the evidence in Booth, does not pose an unacceptable risk that

the jury might ignore relevant considerations and impose the death penalty arbitrarily or capriciously. In view of the virtually unlimited scope of evidence and argument concerning the defendant's background and character which is permitted to a defendant in the capital phase, to preclude reasonable comment by the prosecutor on personal characteristics of the victim shown by the evidence of the circumstances of the offense, would be to redact and neutralize the victim, and to skew the balance in the penalty phase against the prosecution.

To the extent that Booth v. Maryland, supra, \_\_\_U.S.\_\_\_, 96 L.Ed.2d 440, precludes such prosecutorial comment, we submit Booth should be reexamined and overruled, as an incorrect statement of Eighth Amendment requirements. Alternatively, this Court

should limit and clarify Booth to make clear that Booth does not preclude such prosecutorial comment.

ARGUMENT

PERSONAL CHARACTERISTICS OF THE VICTIM REVEALED BY CIRCUMSTANCES OF THE CRIME WHICH ARE IN EVIDENCE ARE A PROPER SUBJECT OF PROSECUTORIAL COMMENT, WHERE RELEVANT TO THE SENTENCER'S ASSESSMENT OF THE GRAVITY OF THE OFFENSE AND THE CULPABILITY OF THE DEFENDANT

We agree with petitioner's assertion that, "The Eighth Amendment does not require a state to redact and neutralize the victim when the properly admitted evidence reveals victim characteristics" which are themselves relevant to the sentencer's assessment of the gravity of the offense and the culpability of the defendant. (Petrn. for Cert., at pp. 18-19.) To the extent that Booth v. Maryland, supra, \_\_\_U.S.\_\_\_, 96 L.Ed.2d 440, concluded otherwise, we



submit Booth should be reexamined and overruled, as an incorrect statement of Eighth Amendment requirements.

Alternatively, this Court should limit and clarify Booth to make clear that Booth does not preclude evidence bearing on the circumstances of the offense, which may disclose personal characteristics of the victim, and prosecutorial comment thereon.

It is axiomatic that the circumstances of the crime are a proper subject of evidence and argument based thereon.<sup>1/</sup>

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1. In California, Penal Code section 190.3 provides, in relevant part:

" . . . In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, . . ."  
(Emphasis added.)



Neither evidence disclosing circumstances of the crime nor comment thereon should be barred simply because such evidence may reveal personal characteristics of the victim. Such personal characteristics may be quite relevant to the sentencer's assessment of the gravity of the offense and the defendant's culpability, in that it may give the jury "a quick glimpse of the life [the defendant] chose to extinguish." (Mills v. Maryland, supra,

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This section goes on to provide, in relevant part:

"In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." (Emphasis added.)

\_\_\_U.S.\_\_\_, 100 L.Ed.2d 384, 408,  
Rehnquist, C.J., dissenting, joined by  
O'Connor, Scalia and Kennedy, JJ.)

The instant case is a good example. The prosecutor referred to the religious items found around the victim, and noted that the evidence showed the victim was "a religious person." He read from the "Game Guys Prayer," one of the religious tracts found among the victim's possessions, and noted the presence of the victim's voter registration card. (Petn. for Cert., at pp. 13-14, 43-46.) The prosecutor characterized these as items respondent "could care little about when he went through" them looking for items of value to steal. (Petn. for Cert., at pp. 8, 13-14, 43-46.) The sentencer could infer from the personal characteristics of the victim shown by the circumstances of the crime that respondent's crime was particularly

aggravated and showed an individual so lacking in accepted standards of human decency that he warranted the death penalty.

Moreover, such evidence is quite unlike that in Booth, which described the effect of the murder on the family and friends of the victim and contained opinions and characterizations of the crime by family members. Even the lead opinion in Booth recognized:

"Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime. . . ." (Booth v. Maryland, supra, \_\_\_ U.S. at \_\_\_, 96 L.Ed.2d at p. 451, fn. 10.)

In order for the balance to be kept true (Snyder v. Massachusetts (1934) 291 U.S. 97, 122) in capital cases, Booth

must be limited. As Chief Justice Rehnquist observed in his dissenting opinion in Mills, supra:

" . . . Virtually no limits are placed on the mitigating evidence a capital defendant may introduce concerning his own history and circumstances, yet the State is precluded from demonstrating the loss to the victim's family, and to society as a whole, through the defendant's homicide. If a jury is to assess meaningfully the defendant's moral culpability and blameworthiness, one essential consideration should be the extent of the harm caused by the defendant. In large measure, the Court's decision in Booth prevents the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder."  
(Mills v. Maryland, supra,  
\_\_\_ U.S. at \_\_\_, 100 L.Ed.2d at  
p. 408 (dis. opn.)

Booth should be limited to the circumstances present in that case. What occurred here was quite different. Booth involved a detailed, statutorily required, Victim Impact Statement (VIS)

which provided the jury with two types of information.

" . . . First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant."

(Booth v. Maryland, supra,  
\_\_\_ U.S. at p. \_\_\_, 96 L.Ed.2d  
at p. 448.)

The VIS in Booth (quoted in full in the Appendix to the majority opinion in Booth) was very detailed and focused in graphic detail on how the lives of the family of the victims had been irrevocably altered by the murders.

The majority in Booth concluded such information was "irrelevant to a capital sentencing decision," and that its admission created a constitutionally unacceptable risk that the jury might impose the death penalty "in an arbitrary and capricious manner" (Booth v. Maryland, supra, \_\_\_ U.S. at p. \_\_\_, 96

L.Ed.2d at p. 448), by ". . . diverting the jury's attention away from the defendant's background and record, and the circumstances of the crime." (Booth v. Maryland, supra, \_\_\_ U.S. at p. \_\_\_, 96 L.Ed.2d at p. 450, emphasis added.)

There was no evidence in the instant case beyond the circumstances of the crime, and argument based thereon was not irrelevant to the capital sentencing decision, and did not pose an unacceptable risk that the jury might ignore relevant considerations and impose the death penalty arbitrarily or capriciously. Instead of diverting the jury's attention away from the circumstances of the crime, there was no evidence in the instant case apart from the circumstances of the crime, and argument based thereon was relevant to an assessment of the gravity of the offense and the moral culpability of respondent.



To preclude such argument is to redact and neutralize the victim, and to skew the balance in the penalty phase against the prosecution.<sup>2/</sup> Respondent was permitted in the instant case to present impassioned pleas from his family

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2. In this respect, amici urge that the proper standard is not, as the Supreme Court of South Carolina concluded, whether the prosecutor's comments were "unnecessary" to an understanding of the circumstances of the crime (Petn., Appendix A, p. 47.), but simply whether the comments were properly based on evidence before the jury concerning the circumstances of the offense.

The opinion, it must be noted, fails to suggest a test for determining what is constitutionally "necessary" to an understanding of the circumstances of the crime.

Indeed, carried to its logical conclusion, the jury's knowledge of the victim's name is "unnecessary" to an understanding of the circumstances of the crime. The accusatory pleading could refer to the victim by amorphous initials, and witnesses and the prosecutor could be similarly admonished concerning their references to the victim.

members and friends that the jury spare his life. (Petn. at pp. 11-13.) Why should it be constitutionally impermissible for the prosecutor to refer in argument to personal characteristics of the victim which are properly in evidence?

The majority in Booth also expressed concern that it would be difficult, if not impossible, to provide a fair opportunity for the defendant "to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant. . . ." (Booth v. Maryland, supra, \_\_\_ U.S. at p. \_\_\_, 96 L.Ed.2d at pp. 450-451.) In the instant case, the argument was based on evidence already before the jury, and it was not unfair to require respondent to meet argument based on such evidence. Nor did such argument shift the focus of the sentencing hearing away from the



defendant, since the argument was relevant to the jury's assessment of the gravity of the crime and respondent's moral culpability.

However, amici would also question why the focus of the sentencing hearing must be exclusively on the defendant, as the quoted language from the majority opinion in Booth appears to suggest. The majority opinion in Booth stated:

"While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing. . . ." (Booth v. Maryland, supra, \_\_\_ U.S. at p. \_\_\_, 96 L.Ed.2d at p. 449.)

The majority opinion in Booth offered no authority in support of this suggestion. The majority cited only Witherspoon v. Illinois (1968) 391 U.S. 510, 519, for the proposition that it is

the function of the sentencing jury to "express the conscience of the community on the ultimate question of life or death," and the plurality opinion of Justices Stewart, Powell and Stevens in Woodson v. North Carolina (1976) 428 U.S. 280, 304, for the proposition that in carrying out this task the jury is required to focus on the defendant as a "'uniquely individual human bein[g].'" (Booth v. Maryland, supra, \_\_\_ U.S. at p. \_\_\_, 96 L.Ed.2d at p. 449.)

But in expressing the "conscience of the community" (Witherspoon), the jury should be able to consider the personal characteristics of the victim, to the extent revealed by evidence properly before the jury as bearing on the circumstances of the crime. Similarly, while the jury must, of course, consider the background and character of the individual defendant, it

should not be precluded from considering personal characteristics of the victim shown by the evidence properly before the jury. Nothing in Woodson requires a jury to focus exclusively on the defendant, and to ignore entirely other relevant considerations shown by the evidence. Indeed, the plurality opinion in Woodson stated:

" . . . A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." (Woodson v. North Carolina, supra, 428 U.S. at p. 304, emphasis added.)

The victim is entitled to at least equal dignity as a unique human being. Personal characteristics of the victim disclosed by the evidence of the circumstances of the offense properly before the jury need not be totally ignored by the prosecutor in argument. The crime need not be treated as a hypothetical construct, and the victim need not be portrayed as no more than a member "of a faceless, undifferentiated mass" to whom the jury simply applies legal abstractions called instructions.

No doubt the jury must include consideration of "the character and record of the individual offender" (Woodson v. North Carolina, supra, 428 U.S. at p. 304), but amici submit that the majority went too far in Booth in suggesting that other considerations are not "relevant" in the penalty phase.

There are legitimate interests of the victim's family, and of society as a whole, which are not irrelevant to the jury's proper assessment of penalty. To the extent that Booth suggests that a prosecutor may make no reference to such interests, and that a jury may not consider them, we submit Booth is an incorrect interpretation of Eighth Amendment requirements. As Justice Blackmun was moved to observe in his dissenting opinion in Furman v. Georgia (1972) 408 U.S. 238, 413-414:

"It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of

reference to the victims. There is risk, of course, in a comment such as this, for it opens one to the charge of emphasizing the retributive. But see Williams v. New York, 337 U.S. 241, 248, 93 L Ed 1337, 1342, 69 S Ct 1079 (1949). Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked. . . ." (Emphasis added.)

The majority opinion in Booth further argued that the character and reputation of the victim and the effect on his family,

" . . . may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family." (Booth v. Maryland, supra, \_\_\_ U.S. at p. \_\_\_, 96 L.Ed.2d at p. 449.

This may be true in some situations. But at least where it is not



"wholly unrelated" to the blameworthiness of the particular defendant, prosecutorial comment concerning personal characteristics of the victim shown by the evidence before the jury should be permissible. The facts to which the prosecutor made reference in his argument to the jury in the instant case were all facts known to respondent. That Reverend Minister Haynes "was a religious person" must have been apparent to respondent, since the victim's religious items and Bibles were found laying next to his body. (Petrn. at p. 10.) Respondent went through those very items looking for something of value to steal. The same was true of the voter card and the Game Guys Prayer.

These circumstances were not irrelevant to the penalty determination. To the contrary, as the prosecutor argued, such evidence suggested

respondent was callously unconcerned about such matters, and "could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks." (Petrn. at pp. 13-14, citing Tr. at pp. 1207-1208.) As petitioner argues in its petition, the evidence revealed the religious effects of the victim were "maliciously scattered around the victim's body by the defendant after he had rejected them as not worthy of theft." (Petrn. at p. 19.) Thus, rather than deflecting attention from respondent's moral blameworthiness, the evidence and argument in this case in fact served to focus the jury's attention on exactly that. —

Amicus urges that Booth should be overruled or clarified and limited, in order to restore a proper balance to



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penalty phase proceedings in capital  
cases.

\* \* \*

CONCLUSION

Prosecutorial comment on personal characteristics of the victim disclosed by evidence properly before the jury concerning the circumstances of the crime should be permissible. Booth v. Maryland, supra, \_\_\_ U.S. \_\_\_, 96 L.Ed.2d 440, should be overruled or clarified and limited accordingly.

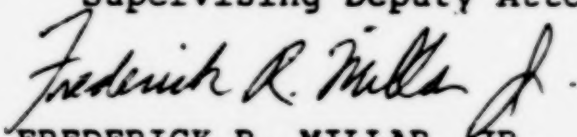
DATED: December 6, 1988

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General  
of the State of California

STEVE WHITE, Chief Assistant  
Attorney General

MICHAEL D. WELLINGTON,  
Supervising Deputy Attorney General

  
FREDERICK R. MILLAR, JR.  
Supervising Deputy Attorney General

Counsel for Amicus Curiae  
State of California

APPENDIXList of the Amici Curiae

State of Alabama  
Don Siegelman, Attorney General  
Alabama State House  
Montgomery, Alabama 36130

State of Connecticut  
John J. Kelly, Chief State's Attorney  
340 Quinnipiac Street  
Wallingford, Connecticut 06492

State of Florida  
Robert A. Butterworth, Attorney General  
The Capitol  
Tallahassee, Florida 32399

State of Georgia  
Michael J. Bowers, Attorney General  
State Law Department  
132 State Judicial Building  
Atlanta, Georgia 30334

State of Illinois  
Neil F. Hartigan, Attorney General  
500 S. Second Street  
Springfield, Illinois 62706

State of Indiana  
Linley E. Pearson, Attorney General  
219 State House  
Indianapolis, Indiana 46204

State of Kentucky  
Frederic J. Cowan, Attorney General  
Capitol Building, First Floor  
Frankfort, Kentucky 40601

State of Maryland  
J. Joseph Curran, Attorney General  
7 North Calvert Street  
Baltimore, Maryland 21201

State of Missouri  
William L. Webster, Attorney General  
Supreme Court Building, Box 899  
Jefferson City, Missouri 65102

State of Nevada  
Brian McKay, Attorney General  
Capitol Complex  
Carson City, Nevada 89710

State of New Jersey  
W. Carry Edwards, Attorney General  
Justice Complex CN-081  
Trenton, New Jersey 08625

State of New Mexico  
Hal Stratton, Attorney General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87504

State of North Carolina  
Lacy H. Thornburg, Attorney General  
P.O. Box 629  
Raleigh, North Carolina 27602

State of Oklahoma  
Robert H. Henry, Attorney General  
State Capitol Building, Room 112  
Oklahoma City, Oklahoma 73105

State of Oregon  
Dave Frohnmayer, Attorney General  
200 Justice Building  
Salem, Oregon 97310

State of Virginia  
Mary Sue Terry, Attorney General  
101 N. 8th Street  
Richmond, Virginia 23219

State of Washington  
Kenneth O. Eikenberry, Attorney General  
Seventh Floor, Highway License Building  
Olympia, Washington 98504

State of Wyoming  
Joseph B. Meyer, Attorney General  
State Capitol  
Cheyenne, Wyoming 82002

CERTIFICATE OF SERVICE BY MAIL

No. 88-305

---

STATE OF SOUTH CAROLINA, Petitioner,

v.

DEMETRIUS GATHERS, Respondent.

---

MICHAEL D. WELLINGTON, a  
member of the Bar of the Supreme Court of  
the United States, states:

That his business address is  
110 West A Street, Suite 700, San Diego,  
California, 92101; that on December  
1, 1988, he caused to be served a true  
copy of the attached Brief of the State  
of California, joined by the states of  
Alabama, Connecticut, Florida, Georgia,  
Illinois, Indiana, Kentucky, Maryland,  
Missouri, New Jersey, New Mexico, Nevada,  
North Carolina, Oklahoma, Oregon,  
Virginia, Washington, and Wyoming, as  
Amici Curiae in the above-entitled  
matter, on counsel for petitioner and

counsel for respondent by placing same in  
an envelope addressed as follows:

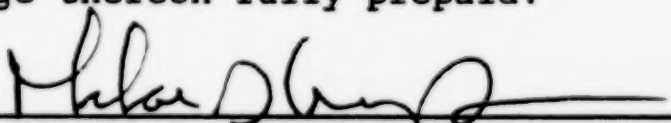
William Isaac Diggs, Esq.  
South Carolina Office  
of Appellate Defense  
1122 Lady Street, Suite 301  
Columbia, South Carolina 29201

(Attorney for Respondent)

Donald J. Zelenka  
Chief Deputy Attorney General and  
Attorney of Record  
Post Office Box 11549  
Columbia, South Carolina 29211

(Attorney for Petitioner)

Said envelope was then sealed  
and deposited in the United States mail  
at San Diego, California, with the  
postage thereon fully prepaid.

  
MICHAEL D. WELLINGTON  
Supervising Deputy Attorney General

FRM:eu

Subscribed and sworn to before me  
this 7<sup>th</sup> day of December, 1988.

  
Notary Public in and for said County and  
State

